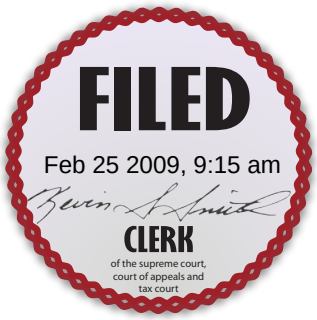

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IN THE
COURT OF APPEALS OF INDIANA

JAMES SUTTLE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0804-CR-230
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton-Pratt, Judge
Cause No. 49G01-0705-MR-76663

February 25, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

James Suttle appeals his conviction of and fifty-year sentence for murder. He raises three arguments: (1) his conviction should be reversed because he acted in self-defense; (2) his conviction should be reduced to voluntary manslaughter because he acted under sudden heat; and (3) his fifty-year sentence is inappropriate. We affirm.

FACTS AND PROCEDURAL HISTORY

On May 1, 2007, Suttle spent the evening drinking alcohol with Myeshia Williams, Billy Kilpatrick, and Terry Taylor on Williams' front porch. As they socialized, Taylor was selling crack cocaine to persons who passed the house. At some point, Suttle asked Taylor if Suttle could purchase cocaine on credit, and Taylor declined to give cocaine to Suttle. Suttle said he was going to get money and he would "be right back," (Tr. at 88), and then walked away laughing and smiling.

After Suttle left, Williams went into her house. Taylor and Kilpatrick went out to the street to listen to music and continue talking. Taylor turned on the radio in his truck and sat on the tailgate, while Kilpatrick leaned against the front of his car facing Taylor. Suttle returned about fifteen minutes after he left, carrying a shotgun. Suttle pointed the shotgun at Taylor and yelled "give me my money." (*Id.* at 94.) Kilpatrick begged Suttle not to shoot Taylor. Suttle fired a shot into the ground. Taylor put his hands in the air and tried to jump off the truck. Suttle shot Taylor twice in the chest and once in the back. Between shots, Suttle was yelling "what's up now, Terry" and "give me my money." (*Id.* at 49.) Kilpatrick ran into Williams' house. Before fleeing the scene, Suttle pointed the shotgun at the house and yelled to Kilpatrick that he was next. Taylor died from his

gunshot wounds.

The State charged Suttle with murder, and a jury found him guilty. At sentencing, the court found a mitigator in Suttle's mental illness, but did not assign it much weight because a doctor testified the diagnosis was "tentative until further observation." (*Id.* at 331-32.) The court also found Suttle's remorse mitigating, his criminal history[1] aggravating, and his probationary status[2] at the time of the crime aggravating. Finding the mitigators outweighed the aggravators, the court sentenced Suttle to fifty years imprisonment.

DISCUSSION AND DECISION

1. Self-defense[3]

Suttle claims he shot Taylor in self-defense. "A valid claim of self-defense is a legal justification for an act that is otherwise defined as 'criminal.'" *Wilson v. State*, 770 N.E.2d 799, 800 (Ind. 2002). To prevail on a self-defense claim, a defendant must demonstrate he was in a place he had a right to be; did not provoke, instigate, or

[1] Suttle's criminal history consisted of two misdemeanor convictions of driving with a suspended license and a misdemeanor conviction of carrying a handgun without a license.

[2] Suttle was on probation for carrying a handgun without a license.

[3] Ind. Code § 35-41-3-2 provides:

> (a) A person is justified in using reasonable force against another person to protect the person or a third person from what the person reasonably believes to be the imminent use of unlawful force. However, a person:
>
> (1) is justified in using deadly force; and
>
> (2) does not have a duty to retreat;
>
> if the person reasonably believes that that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony. No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting the person or a third person by reasonable means necessary.

participate willingly in the violence; and had a reasonable fear of death or great bodily harm. *Id.* The amount of force a person may use to protect himself depends on the urgency of the situation. *Harmon v. State*, 849 N.E.2d 726, 730-31 (Ind. Ct. App. 2006). However, if a person uses "more force than is reasonably necessary under the circumstances," his self-defense claim will fail. *Id.* at 731.

When a defendant claims self-defense, the State has the burden of disproving at least one of the elements beyond a reasonable doubt. *Wilson*, 770 N.E.2d at 800. "The State may satisfy its burden by either rebutting the defense directly or relying on the sufficiency of evidence in its case-in-chief." *Pinkston v. State*, 821 N.E.2d 830, 842 (Ind. Ct. App. 2004). As we review the sufficiency of evidence disproving self-defense, we may neither reweigh the evidence nor assess the credibility of the witnesses. *Wilson*, 770 N.E.2d at 801. If evidence of probative value supports the judgment, then we must affirm. *Id.*

Suttle argues he "was clear and unwavering in his testimony he shot Taylor only because he feared Taylor would attack and kill him." (Appellant's Br. at 12.) However, we may not consider Suttle's testimony, as it is not favorable to the judgment. The facts favorable to the judgment are that Suttle returned to Williams' house with a shotgun, told Taylor he wanted his money, and then shot Taylor as Taylor was trying to flee with his hands up. That evidence supports the conclusion Suttle was not acting in self-defense. *See Wilson*, 700 N.E.2d at 801 (self-defense fails where defendant was willing participant in the shooting); *Pinkston*, 821 N.E.2d at 842 (self-defense fails where defendant walked

to car, retrieved gun, returned to scene, and began shooting, killing two unarmed victims).

2. Sudden Heat

Suttle asserts the evidence proved he committed voluntary manslaughter, rather than murder. "Voluntary manslaughter is an inherently included lesser offense of murder." *Washington v. State*, 808 N.E.2d 617, 625 (Ind. 2004). The only element distinguishing the two crimes is "sudden heat," which reduces murder to voluntary manslaughter.[4] *Id.*

> Sudden heat occurs when a defendant is provoked by anger, rage, resentment, or terror, to a degree sufficient to obscure the reason of an ordinary person, prevent deliberation and premeditation, and render the defendant incapable of cool reflection. Sudden heat excludes malice, and neither mere words nor anger, without more, provide sufficient provocation.

Connor v. State, 829 N.E.2d 21, 24 (Ind. 2005) (internal citations omitted). Neither are "insults or taunts alone" sufficient provocation to demonstrate a defendant acted in sudden heat. *Watts v. State*, 885 N.E.2d 1228, 1233 (Ind. 2008).

When a defendant asserts he acted in sudden heat, the State "assumes the burden of disproving the existence of sudden heat beyond a reasonable doubt." *Adkins v. State*, 887 N.E.2d 934, 938 (Ind. 2008). When assessing whether the State met this burden we neither reweigh the evidence nor judge the credibility of witnesses. *Green v. State*, 875 N.E.2d 473, 479 (Ind. Ct. App. 2007). We consider the evidence most favorable to the

[4] A person who knowingly or intentionally kills another human being commits murder. Ind. Code § 35-42-1-1. A person who knowingly or intentionally kills another human being while acting under "sudden heat" commits voluntary manslaughter. Ind. Code § 35-42-1-3.

jury's verdict, and the reasonable inferences therefrom, and determine whether the trier of fact reasonably could have found the defendant guilty of murder beyond a reasonable doubt. *Id.*

To support his claim of sudden heat, Suttle cites numerous portions of his own testimony. (*See* Appellant's Br. at 10.) However his self-serving testimony is not evidence favorable to the jury's verdict, and we may not consider it as we review his conviction. Kilpatrick and Williams testified Suttle left Williams' house saying he was going to get money. Neither Kilpatrick nor Williams reported any animosity or argument between Suttle and Taylor before Suttle left. Rather, Kilpatrick said Suttle was laughing and smiling as he left. Upon returning, Suttle immediately began yelling at Taylor and shooting. These facts would permit the jury to find beyond a reasonable doubt that Taylor did nothing to provoke Suttle into "sudden heat." *See Taylor v. State*, 530 N.E.2d 1185, 1186 (Ind. 1988) (evidence permitted judge to find victim did not provoke defendant). Moreover, the fact that Suttle was away from the scene for fifteen minutes before returning to shoot Taylor is inconsistent with "sudden heat." *See Washington*, 808 N.E.2d at 626 (defendant did not act in sudden heat when "he did not attack [the victim] until several hours later after he had obtained a knife, covered his hands with socks, and waited for the victim to return").

3. Sentence

We may revise a sentence if we find it "inappropriate in light of the nature of the offense and the character of the offender." App. R. 7(B). To revise a sentence, we need

not first find the trial court abused its discretion in determining the sentence. *Smith v. State*, 889 N.E.2d 261, 263 (Ind. 2008). The "defendant must persuade [us] that his or her sentence has met this inappropriateness standard of review." *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

The sentencing range for murder is forty-five to sixty-five years, with the advisory sentence being fifty-five years. Ind. Code § 35-50-2-3. The court found aggravators in Suttle's criminal history and his status as a probationer at the time of the murder and mitigators in Suttle's remorse and his mental illness. Finding the mitigators outweighed the aggravators, the court sentenced Suttle to fifty years.

Suttle acknowledges a fifty-year sentence is appropriate in light of the nature of his offense. (Appellant's Br. at 7) ("These circumstances alone do not alter the nature of this offense to make a fifty year sentence inappropriate.") However, in reaching that conclusion, Suttle views the facts in the light most favorable to himself, which we will not do. The facts favorable to the judgment are that Suttle killed Taylor in cold blood because Taylor would not give him money. Suttle left the scene, obtained a shotgun, returned to the scene and shot Taylor multiple times in the chest and back. The nature of his offense could justify a sentence at or above the advisory sentence for murder.

Nevertheless, Suttle believes his sentence is inappropriate in light of his character − specifically his minimal criminal history, his remorse, his family support, and his mental illness. We note the trial court took the first three of those facts into account

when it set Suttle's sentence at five years below the advisory sentence.[5] Suttle's criminal history consists of only three misdemeanor convictions: two for driving while suspended and one for carrying a handgun without a license; however, Suttle was on probation for the handgun conviction when he committed the present offense. We agree with Suttle that his expression of remorse and family support are such that his character weighs in favor of his receiving a sentence below the advisory.

Suttle has not demonstrated that his sentence is inappropriate. While his character justifies a sentence less than the advisory, that is what the trial court imposed. His character is not such that it requires us to overlook the nature of his offense. Accordingly, we do not find inappropriate his fifty-year sentence.

Affirmed.

NAJAM, J., concurs.

ROBB, J., concurring with separate opinion.

[5] At sentencing, the Court found Suttle has "some form of mental illness," but did not give it much weight as a mitigator because the doctor said the diagnosis of paranoid schizophrenia "should be considered tentative until you were either observed over a longer period of time or additional medical records become available." (Tr. at 331.) Suttle does not challenge the accuracy of that finding.

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ROBB, Judge, concurring with separate opinion

I concur with the majority opinion but write separately because I characterize Suttle's statements regarding the inappropriateness of his sentence differently than the majority. The majority asserts "Suttle acknowledges a fifty-year sentence is appropriate in light of the nature of his offense." Suttle actually argues, "[t]hese circumstances[, acting in self-defense and in the heat of passion,] alone do not alter the nature of this offense to make a fifty year sentence inappropriate. But, when they are considered through the lens of Mr. Suttle's character, and specifically his mental illness, a fifty year sentence is inappropriate." Appellant's Brief at 7.

I do not understand Suttle's argument as an acknowledgment that his sentence is appropriate in light of the nature of his offense. Rather, I understand Suttle to argue that his assertions that he acted in self-defense and in the heat of passion merit an initial reduction from the advisory sentence to fifty years, and the mitigating circumstances of his character merit an additional reduction in his sentence. However, because I would reach the same result as the majority, I concur in the opinion. With respect to the merits of Suttle's claims regarding self-defense and sudden heat, I concur fully with the majority.